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PETITION FOR WRIT OF CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1969

No. [redacted] 118

DEAN JULIOUS WALSH,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

s/ Franklin Smith
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DEAN JULIOUS WALSH,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

The petitioner, Dean Julious Walsh, prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment of that Court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The judgment of the Court of Appeals for the Fourth Circuit (Petitioners' Appendix I) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered in the Office of the

Clerk of said Court of Appeals on April 15, 1969. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C. Section 1254.

QUESTION PRESENTED

Did the Court commit error in denying the defendant's motion for judgment of nonsuit at the close of the government's evidence?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment of the Constitution of the United States.

2. The Fifth Amendment of the Constitution of the United States.

3. The Fourteenth Amendment of the Constitution of the United States.

4. 26 United States Code 5601 (a) (12), 5205 (a) (2), 5604 (a) (12), 5202 (a) (2), 5604 (a) (1).

5. 18 United States Code 4208 (a) (2).

STATEMENT OF THE CASE

That the defendant, Dean Julious Walsh, was indicted in the United States District Court for the Middle District of North Carolina, at Salisbury, for violation of the Internal Revenue Code, 26 U.S.C. 5601 (a) (12), 5205 (a) (2), 5604 (a) (12), 5202 (a) (2), 5604 (a) (1). That a plea of not guilty was entered and trial by jury was waived by the defendant and that the case was tried before the Honorable Eugene A. Gordon. That at the close of all the evidence a motion of Judgment of Nonsuit was made on behalf of the defendant, beginning at line 2, page 3 of the transcript of evidence entitled Extracted Motions, Verdict and Sentence. That the motion for Judgment of Nonsuit was overruled by Judge Eugene A. Gordon and that after

hearing arguments of the attorney on behalf of the defendant, the Court sentenced the defendant, Walsh. The defendant was committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of thirteen months. That pursuant to the provision of 18 U.S.C. 4208 (a) (2), the defendant shall become eligible for parole at such time that the Board of Parole may deem, as shown beginning at line 10, page 13 of the transcript of evidence entitled Extracted Motions, Verdict and Sentence.

A witness for the government, Jack C. Berry, a government agent from Gainsville, Georgia, testified that he was working with a governmental informant named, Arnold H. Shoaf and that on March 9, 1967, he was with Mr. Shoaf and was present when a telephone call was placed to the defendant and that that evening 120 gallons of whiskey were delivered by the defendant to Davidson County, North Carolina, and that on June 22, 1967, that the defendant came to a residence that had been rented by Jack C. Berry on the old Thomasville Road at Gum Tree, Davidson County, North Carolina. That at this time, Jack C. Berry purchased 22 cases of whiskey for a price of $638.00 from the defendant. The whiskey was purchased by government money. The evidence further indicates that Mr. Berry and Mr. Shoaf were working undercover and under the supervision of the government agent, Bob Martin, the investigator in Salisbury, North Carolina. That the government agents and their informant contacted the defendant without informing him that they were government agents; that they induced and pursuaded the defendant to sell whiskey to the government agents; that the intent to violate the Internal Revenue Code originated in the minds of the Internal Revenue agents and that the agents themselves carried forth their instigation and their overt acts that the Internal Revenue Code was violated as charged in the Bill of Indictment against the defendant, Dean Julious Walsh, and that the conduct of

the government's officers Berry and Shoaf as revealed in this case falls below standards to which common feelings respond, for the proper use of governmental power.

In apt time a notice of appeal was taken to the United States Court of Appeals for the Fourth Circuit and a brief was filed. Subsequently the Counsel for the petitioner was advised that this case was set for argument before the said circuit Court for Friday, April 11, 1969. Subsequent thereto the said Court notified the petitioner through his counsel of record that the case would not be set for oral argument on Friday, April 11, 1969, the case would be decided as submitted on the briefs. That on April 15, 1969, the petitioner was notified through his counsel of record that the United States Court of Appeals for the Fourth Circuit had affirmed the petitioner's conviction in the District Court for the Middle District of North Carolina.

FEDERAL JURISDICTION

This was a criminal action instituted by the United States upon an inductment charging the petitioner with violation of criminal statutes under the Internal Revenue Code, 26 U.S.C. 5601 (a) (12), 5202 (a) (2), 5604 (a) (12), 5202 (a) (2), 5604 (a) (1). This was the basis for Federal jurisdiction of this case.

AUTHORITIES RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the Supreme Court of the United States and other Federal Circuit Courts, and is specifically in conflict with the following decisions:

1. Escobedo, 378 U.S. 478 at 497.
2. Winston Massiah v. United States, 377 U.S. 201.

3. Maranda v. State of Arizona, U.S.S.C. 302, 66.

4. Sherman v. United States, supra, 356 U.S. at 373, 78 S.C.T. 819, 2L.Ed.2d 848.

5. United States vs. Becker, 62 F.2d 1007.

6. Sorrells v. United States, supra, 287 U.S. at 451, 53 S.Ct. 210, 77 L.Ed. 413.

7. 18 United States Code 4208 (a) (2).

8. 26 United States Code 5601 (a) (12), 5205 (a) (2), 5604 (a) (12), 5202 (a) (2), 5604 (a) (1).

That the petitioner argues and contends that the trial Judge should have granted his motion for Judgment of Non-suit at the close of the government's evidence on the grounds of entrapment as relied upon by the defendant at the top of page 3 of Extracted Motions, Verdict and Sentence in the transcript of evidence. The evidence will indicate as stated on line 3 on page 4 of the Extracted Testimony of Jack C. Berry, government agent and continuing to line 5 on page 5 and beginning on line 24 of page 5 and continuing to line 7 page 6 and beginning with line 22 on page 7 continuing through line 24 on page 8. That the purchase of whiskey was made by Jack C. Berry and one, Mr. Shoaf, from the defendant, Dean Julious Walsh, and that the intent to violate the Internal Revenue Laws originated in the minds of the government's agents; and that a violation occurred because of the creative activity of the government's agents; that nowhere in the record is there any evidence that the defendant, Petitioner, had any preconceived criminal disposition until such disposition was implanted by the government's agents. There is no evidence in the record that the petitioner had a preconceived disposition or the apparent ability to violate the Internal Revenue Laws as the petitioner was charged and convicted of.

"In Protecting the rights of an accused asserting a defense of entrapment, the courts are not concerned with the exclusion of evidence. They are commanded to permit a full and sweeping disclosure of all evidence surrounding the transaction which affords the basis for the crime charged. The same acts may or may not constitute entrapment, depending upon the 'conduct and predisposition' of the accused. Sherman v. United States, supra, 356 U.S. at 373, 78 S. Ct. 819, 2 L.Ed.2d 848; Sorrells v. United States, supra, 287 U.S. at 451, 53 S.Ct. 210, 77 L.Ed. 413.

In Sherman and Sorrells, it is clear that under proper circumstances it is permissible for government officials to use decoys to afford opportunities or facilities for the commission of an offense. The 'line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.' "

No where in the presenting of the government's evidence did the government show that the petitioner ever had any prior dealings in the whiskey business and a reputation prior to the date of this conviction, instead all of the evidence indicated the intent to commit the crime originated in the minds of the government agents and that it was because of the creative activity of the law enforcement officers themselves that the said intent was implanted by the government agents into the innocent mind of Dean Julious Walsh, as indicated in the transcript of evidence beginning on line 22, page 7 and continuing through line 24, page 8.

Entrapment has been described as shocking to the sense of justice unconscionable and unacceptable to a sense of justice and fair play. Judge Learned Hand's characterization of the defense is typical, United States v. Becker, 62 F.2d 1007: "The whole doctrine derives from a spontaneous moral

revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist." It is obvious from the evidence that the government's agents Jack C. Berry used Mr. Shoaf, a man of known reputation for dealing in illicit whiskey to beguile this otherwise innocent defendant in violating the law that the defendant otherwise would have resisted.

(2) A law review article in the Yale Law Journal, Volume 74, page 942, concerning the law of entrapment chose appropriate title for the article THE SERPENT BEGUILED ME AND I DID EAT THE CONSTITUTIONAL STATUS OF THE ENTRAPMENT DEFENSE. The defendant contends that the constitution establishes three independent limitations on police conduct, breach of any one giving rise to avalid entrapment defense. 1. The privilege against self-incrimination prohibits the use of coercion in solicitation. 2. Due process forbids the conviction of any person for a solicited offense unless he had been engaged in a course of criminal conduct or had a criminal design. 3. And the prohibition against search and seizure requires the police to have reasonable grounds for suspecting such conduct or design before they engage in solicitation. The defendant contends that all three limitations are applicable to the state, as well as the federal government.

The defense of entrapment historically has been treated by the Courts as a constitutional argument; however, Justice White was bothered with the precedent established in the *Escobedo* case, when he wrote in his dissenting opinion that:

> "Under this new approach (of the majority in *Escobedo)* one might just as well argue that a potential defendant is constitutionally entitled to a lawyer before, not after he commits a crime, since it is then that crucial and incriminating evidence is put within reach of the government by the would-be accused." 378 US.S 478 at 497.

That the defendant contends that the decision of ***Winston Massiah v. United States,*** 377 U.S. 201, is far more reaching than the widely publicized decision of ***Maranda v. State of Arizona,*** 86 S.Ct. 1602, or the ***Escobedo*** case since these cases deal with in custody interrogation; since the Massiah case deals with the admission of incriminating statements made by the defendant in the presence of a co-defendant after the defendant had been taken into custody and released on bail and the statements recorded on the radio was in violation of the defendant's, Massiah's, constitutional rights against self-incrimination.

In conclusion, the defendant contends that the conduct of agents Berry and Shoaf should not be sanctioned by the Court, since Shoaf was used by the government agent to beguile this otherwise innocent and ductile person into violating a federal statute that he otherwise would not have violated. The government should at least have to show that the defendant was already willing and able and had the apparent ability and reputation for the violation of the Internal Revenue Laws before soliciting from him the whiskey and thus violating an Internal Revenue Statute. That the law of entrapment as stated by the appellant Courts, inferior to the United States Supreme Court, is an employment of judicial power as an instrument for the lawless enforcement of the criminal law and the government in this case should have the burden of showing the activity of thier agent and the agent Shoaf was necessary and not merely rationally related to the accomplishment of permissible government policy. Therefore, the defendant respectfully request that his Petition for a Writ of Certiorari be allowed and that his plea of entrapment be sustained under the tests as laid down in the Sorrels and Sherman cases and that the United States Supreme Court go a step further and apply the constitutional protection of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States to this type of lawlessness and

creative activity on behalf of the United States Government's own agents.

Respectfully submitted,

s/ *Franklin Smith*

FRANKLIN SMITH
Attorney for Petitioner
Elkin, North Carolina

CERTIFICATE OF SERVICE

I hereby certify that I mailed three copies of the foregoing Petition for a Writ of Certiorari to counsel of record for the respondent, The Solicitor General, Department of Justice, Washington, D. C. 20543, by depositing the same in a United States Post Office, with first-class postage prepaid, addressed to said counsel of record for the respondent, at the above post office address, furnished by said counsel of record for the respondent.

s/ *Franklin Smith*

Counsel for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,118

United States of America,

Appellee,

versus

Dean Julious Walsh,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Salisbury. Eugene A. Gordon, District Judge.

(Decided April 15, 1969).

Before HAYNSWORTH, Chief Judge, and BOREMAN and CRAVEN, Circuit Judges.

Franklin Smith, for Appellant, and William H. Murdock, United States Attorney, (H. Marshall Simpson, Assistant United States Attorney, on brief), for Appellee.

PER CURIAM:

There is abundant evidence in this routine nontaxpaid liquor case that the defendant violated the Internal Revenue laws, as charged, by selling large quantities of nontaxpaid whiskey to a government undercover agent. There is not the slightest indication in the record of entrapment, and the contention to the contrary is frivolous.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1397

DEAN JULIOUS WALSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.; IV R. 11–12)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1969 (IV R. 14). The petition for a writ of certiorari was filed on May 15, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was illegally entrapped into making sales of non-taxpaid whiskey.

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[1] The four-volume record is on file with the Clerk of this Court.

353-319—69

STATEMENT

At a jury-waived trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of the removal, concealment, possession, transportation and sale of 120 gallons of non-taxpaid whiskey on or about March 9, 1967, in violation of 26 U.S.C. 5601(a)(12), 5205(a)(2) and 5604(a)(1) (I R. 5), and of similar offenses in regard to 132 gallons of non-taxpaid whiskey on or about June 22, 1967. He was sentenced to imprisonment for 13 months, to become eligible for parole at such time as the Board of Parole might determine under 18 U.S.C. 4208(a)(2) (I R. 7; III R. 13). On appeal the conviction was affirmed (IV R. 14).

The evidence showed that Jack C. Berry, a special investigator assisting Alcohol and Tobacco Tax agents in an undercover capacity, was working in Davidson County, North Carolina, with an informant named Shoaf (II R. 3–4). On March 9, 1967, under the direction of one of the agents, Shoaf telephoned petitioner and inquired about purchasing some whiskey. Agent Berry listened in on the conversation (II R. 4, 8). That evening, at about 6:20 p.m., Berry and Shoaf went to a prearranged place and waited. At about 7:10 p.m., petitioner arrived in a Buick and told Berry and Shoaf that "he was the man [they] were to meet." Petitioner also told them, "Just back on down the road, and it will be all right there" (II R. 4). When Berry mentioned to petitioner that a car had followed him to the meeting place, petitioner said "they were all right—that they had followed him down here" (II R. 10–11).

After Berry backed his truck down the road, petitioner and Shoaf unloaded 120 gallons of non-taxpaid whiskey from petitioner's Buick into the government truck (II R. 4–5). Shoaf paid petitioner $580 previously given him by Berry (II R. 5, 6).

On June 22, 1967, Berry personally made arrangements with petitioner to purchase whiskey from him (II R. 5–7). Petitioner drove to a residence Berry had rented and delivered 22 cases of non-taxpaid whiskey which was unloaded and placed in a shed. Berry paid petitioner $638 for the whiskey (II R. 5–6).

Petitioner presented no evidence for the defense (III R. 3).

ARGUMENT

Petitioner's contention that he was illegally entrapped into making the sales of non-taxpaid whiskey is without substance. As this Court stated in *Sherman v. United States*, 356 U.S. 369, 372:

> * * * [T]he fact that the government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials. (Emphasis supplied [by the Court].) * * *

Here there was no showing that the sales were the product of creative activity of the law enforcement officials. Although the informant and agent Berry took the initiative in asking to purchase whiskey from petitioner, they did no more than provide him with the

opportunity to engage in the illegal activity, and this did not constitute entrapment. See *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369; *Masciale* v. *United States,* 356 U.S. 386; *Lopez* v. *United States,* 373 U.S. 427, 434. There is nothing in the record to show that any undue persuasion or inducement was required before petitioner made the sales on the two separate dates involved.[2]

In citing *Massiah* v. *United States,* 377 U.S. 201; *Escobedo* v. *Illinois,* 378 U.S. 478; and *Miranda* v. *Arizona,* 384 U.S. 436 (Pet. 7–8), petitioner apparently makes the argument that he should have been warned by the government agent that he was under investigation prior to any communication with him by the agent. An undercover agent is not, however, under a duty to disclose his identity as such. *Lewis* v. *United States,* 385 U.S. 206.

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[2] It was not necessary that the government introduce as part of its case evidence that petitioner had a previous reputation as a violator of the federal laws relating to whiskey sales. Petitioner's counsel did not even mention the defense of entrapment until the government had closed its case (III R. 3). If the defense had given some indication that it had some factual basis for a claim of entrapment, the government might have found it necessary to produce evidence of petitioner's predisposition to commit the offense.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JUNE 1969.